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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

75-
No. 1016

JACKSON D. LEONARD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

ARGUMENT—A recently obtained affidavit of Eva Brooke, a key witness at trial, demonstrates that her testimony, which was "crucial" to the government's case, was obtained as a result of false threats that she would be arrested and extradited from England

These circumstances were improperly concealed from defense counsel at trial and deprived petitioner of a fair trial 3

1. The Claims Asserted in the Petition for Certiorari Are Corroborated by the Affidavit 3

2. The Threats to Mrs. Brooke That She Was Subject to Arrest and Extradition in England Were False, but Nonetheless "Terrified" Her Into Testifying as Required by the Government, Which Circumstances Were Improperly Concealed From Defense Counsel 6

3. The Affidavit Demonstrates That Eva Brooke's Testimony, Tainted by Improper Threats, Was "Crucial" to the Government's Case 7

Conclusion 8

APPENDIX:

Affidavit of Eva Eileen Brooke 1a

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SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

On January 6, 1976, Jackson D. Leonard, the petitioner, filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter "the Petition").

On February 26, 1976, Solicitor General Robert H. Bork wrote to the Court seeking an extension of time to file the government's response until April 8, 1976. In response, on March 2, 1976, petitioner's counsel wrote to the Court expressing concern that if the delay were granted, a pending case before the Court, which raised a related (but not

identical) issue might be decided before the Court had an opportunity to consider the related issue raised in the Petition.*

Thereafter, by letter dated March 12, 1976, the Court granted the government an extension, but only until March 31, 1976.

No response was filed by the government on March 31, 1976, but the Court has scheduled the Petition for conference April 16, 1976.

The government has advised petitioner, that notwithstanding the March 31, 1976 cut-off, it would seek to file its response by April 12, 1976 and would mail its brief to counsel for the petitioner at that time. Since this would deprive petitioner of a substantial right, namely adequate time to file a Reply Brief before conference, Rule 24(4), Supreme Court Rules, the within Supplement to the Petition is being filed instead.*

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* The pending case, *Beckwith* v. *U.S.*, No. 74-1243, was argued December 1, 1975.

* This Supplement to the Petition is submitted at the suggestion of the Clerk's Office. By letter dated April 6, 1976 to the Court, petitioner has also requested that, in view of the government's failure to file its brief within the required period, the Petition for Certiorari be granted, the judgment of the Second Circuit reversed, and the case remanded with instructions that the indictment be dismissed.

ARGUMENT

A recently obtained affidavit* of Eva Brooke, a key witness at trial, demonstrates that her testimony, which was "crucial" to the government's case, was obtained as a result of false threats that she would be arrested and extradited from England.

These circumstances were improperly concealed from defense counsel at trial and deprived petitioner of a fair trial.

1. The Claims Asserted in the Petition for Certiorari Are Corroborated by the Affidavit.

Petitioner previously raised in the Petition the claim that during the trial, the government had obtained the presence and testimony of a key foreign witness, Eva Brooke, "upon the false threat that she was otherwise subject (in England) to 'extradition and arrest' although she was completely innocent of any wrongdoing". Petition, page 29. Petitioner had further claimed that the government had failed to disclose and indeed had concealed these circumstances at trial, in violation of this Court's mandate in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

It was noted then that the first time defense counsel learned that improper threats may have been used against the witness was after the trial, after sentence, and only when the government filed the Letter Rogatory (which it had secretly obtained *ex parte* during the trial) as part of the record on appeal. Petition, page 31, fn. As was also pointed out in the Petition, there was no legitimate prosecutorial or judicial reason for this *ex parte* procedure.**

* The affidavit dated March 8, 1976 is set forth in the Appendix. The original has been lodged with the Clerk of the Court.

** Indeed, *ex parte* practice of the sort conducted herein was recently criticized by a report by the Association of the Bar of

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The claims raised in the Petition were based primarily on conclusions drawn from the Letter Rogatory itself, which explicitly requested that Eva Brooke be arrested and extradited, if necessary, by a Court in London, England in order to compel her presence and testimony in New York.

The affidavit of Mrs. Brooke set forth in the Appendix now clearly demonstrates that the inferences which had been drawn from the improper Letter Rogatory were clearly correct. Indeed, it can fairly be said that the inferences drawn were far less damaging than the reality.

The facts, as set forth in Mrs. Brooke's affidavit, are as follows: The government first contacted her in November or December 1974, when it served a subpoena on her while she was "winding up [her] late husband's [estate]" in Oklahoma. She was thereafter interviewed in New York and "instructed [by the prosecutor] not to contact Mr. Leonard".

In January 1975, while she was at her home in England, she received calls from the prosecutor who told her he wanted her "to fly to New York to testify against Mr. Leonard and that he had obtained a second subpoena* directing me to appear in New York".

Although she was too ill to travel "as a result of the after effect of an automobile accident", the prosecutor insisted. In fact, the prosecutor said that she was a "key witness" and that her "testimony would be critical". Indeed, the prosecutor told her that medical assistance

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New York. See the Record of the Association of the Bar of the City of New York, Committee Report, Formal Opinion No. 887, by the Committee on Professional and Judicial Ethics, Volume 30, No. 7 at page 507, October 1975. Additionally, since this was simply a tax case against a chemical engineer (petitioner's profession), the government's conduct below cannot be justified by reason of any legitimate concern for the safety of a witness.

* Possibly the improper Letter Rogatory.

would be furnished but Mrs. Brooke "repeated" that she was not able to travel.

Notwithstanding, the prosecutor continued to phone her in England and insist that she come. The prosecutor even phoned her doctors in England to confirm the state of her health. Thereafter, she received a call from someone at the American Embassy in London who also told her that she "had to testify" and further "that the U.S. Government was prepared to have a nurse accompany her to New York".

Mrs. Brooke then tried to phone the prosecutor in New York to tell him that she could not travel. The prosecutor was in court at the time and she spoke instead to a man who said he was the prosecutor's assistant. The prosecutor's assistant explicitly threatened her and told her that if she "did not come to New York, *the United States Government would have me arrested in England and extradited to the United States*". [Emphasis added] The assistant further threatened that in the future she "would never be allowed into the United States again".

The next day, the prosecutor again called her insisting that she testify.

> "By that time I was exhausted from the daily pressure and terrified that if I failed to come to the United States, *I would be subject to arrest and extradition.*" [Emphasis added]

As a result, Mrs. Brooke, who, it must be remembered, had been recently widowed, flew to New York. She was called as a witness and testified, but did not "disclose to [petitioner's] lawyer the circumstances under which she had come to the trial".

2. The Threats to Mrs. Brooke That She Was Subject to Arrest and Extradition in England Were False, but Nonetheless "Terrified" Her Into Testifying as Required by the Government, Which Circumstances Were Improperly Concealed From Defense Counsel.

The threats by the government that unless she came to the United States, she would be arrested and extradited were false. As noted at pages 29-31 of the Petition, there is no legal authority to arrest or extradite a witness from England to testify in a trial in the United States. The Letter Rogatory which the government drafted and which purported to rely on such authority was simply a phony.

Nevertheless, Mrs. Brooke, a widow who was concededly ill at the time, was particularly vulnerable to improper intimidation. Indeed, she states explicitly that unless she did what the prosecutor required, she was "terrified that . . . I would be subject to arrest and extradition" in England.

The Second Circuit stated the following with respect to this claim:

> "Counsel makes a variety of attacks, unnecessary to detail, on the methods by which the prosecution secured the presence of Mrs. Brooke. Apart from the fact that it is not clear that these objections were raised below and that they are of doubtful merit, the short answer is that impropriety in the method by which the prosecution has obtained the attendance of a witness, while a proper subject for cross-examination or proof insofar as the impropriety may go to the weight of the witness' testimony, is not of itself a ground for reversal." Appendix A, page 29a.

The objections could never have been "raised below" because the Letter Rogatory was obtained secretly and "ex parte." Since defense counsel was unaware of the threats, no cross-examination or proof could possibly have

been offered. Additionally, the Court makes a very substantial assumption; namely, that the false threats had no effect on the content of her testimony, an assumption which it is respectfully submitted cannot safely be made and indeed is wrong. See *U.S.* v. *Miller*, 411 F.2d 825, 831-832 (2d Cir. 1969).

Most importantly, however, it must be emphasized that the circumstances were never revealed to the Petitioner's attorney at trial but rather were concealed from him, through the *ex parte* procedure adopted by the prosecutor. See page 31, Petition for Certiorari.

3. The Affidavit Demonstrates That Eva Brooke's Testimony, Tainted by Improper Threats, Was "Crucial" to the Government's Case.

This is not a case where the testimony of an unimportant witness was affected by governmental misconduct. Mrs. Brooke's affidavit demonstrates that in the prosecutor's view alone she was critical to the government's case; indeed, as noted, the prosecutor himself told her that she was a "key witness" and her testimony was "crucial".

The prosecutor's analysis was clearly correct. The primary issue at the trial was the question of intent, whether the petitioner had signed tax returns for two years "wilfully and knowingly" that material amounts were omitted. The amount alleged by the indictment to have been omitted in 1967 ($24,168) was relatively small (less than 10%) in relation to his adjusted gross income ($259,051) for that year. The amount allegedly omitted in 1968 ($58,684) was challenged by defense counsel as inaccurate and as, in fact, only amounting to $6,229 or less than 5% of his adjusted gross income ($134,276) for that year.*

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* The money allegedly omitted by petitioner in both 1967 and 1968 was a small portion of approximately $750,000 paid to him

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The government's proof on intent, as the prosecutor's statements to Mrs. Brooke imply, substantially boiled down to her testimony, which it now appears was tainted by governmental overreaching and intimidation, never disclosed at trial.* Petitioner's lack of knowledge was consequently critical and deprived him of the ability to effectively cross-examine the "key witness" against him. Accordingly, petitioner was deprived of a fair trial.

CONCLUSION

For the foregoing reasons, the Petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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Jackson D. Leonard

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by Union Carbide Corporation ("UCC") under a contract for the design of a chemical plant in Taft, Louisiana. However, on February 1, 1968, the UCC contract was assigned by petitioner to his Subchapter S Corporation, Leonard Process Co., Inc. ("Leonard Inc."). Accordingly, only the monies paid by UCC to petitioner in January 1968 and omitted from his 1968 return (i.e., $6,229), were even arguably required to have been reported by him; the remaining $52,455 paid by UCC over the balance of 1968 (and allegedly omitted) belonged to Leonard Inc. (petitioner's Subchapter S Corporation), but not to petitioner personally, and therefore were not required to be reported on his personal 1968 tax return.

* This is clearly demonstrated by the prosecutor's summation; it relied and indeed concluded on the credibility of Mrs. Brooke's testimony.

APPENDIX

Affidavit of Eva Eileen Brooke.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

74 Cr. 599

UNITED STATES OF AMERICA,

against

JACKSON D. LEONARD,

Defendant.

LONDON
ENGLAND } ss.:

EVA EILEEN BROOKE, being duly sworn, deposes and says:

I am a citizen and resident of England. On January 16, 1975 I testified as a witness for the Government in the case of *United States of America* v. *Jackson D. Leonard,* 74 Cr. 599, in Federal Court in Manhattan, New York City.

The circumstances of my appearing as a witness were as follows:

In November or December 1974, while I was in Oklahoma City winding up my late husband's affairs, I was served with a subpoena and thereafter met in New York with Assistant United States Attorney Cullen MacDonald, who interviewed me for several hours concerning conversations which I and my late husband had had with Mr. Leonard. Mr. MacDonald instructed me not to contact Mr. Leonard.

In January 1975 I was at my home in England when I received a telephone call from Mr. MacDonald telling me that he wanted me to fly to New York to testify against

Mr. Leonard and that he had obtained a second subpoena directing me to appear in New York as a witness.

I told Mr. MacDonald that I did not wish to testify against Mr. Leonard and that, as a result of the after effect of an automobile accident, I was too ill to travel.

Mr. MacDonald told me that he expected me to be a "key witness" and that my testimony would be "crucial" and that, if necessary, he would furnish me with medical assistance. I repeated that I was not willing to travel to New York.

During the next few days I received several further telephone calls from Mr. MacDonald insisting that I must come to New York. I understand that Mr. MacDonald also called my doctors in England concerning the state of my health.

I continued to tell Mr. MacDonald that I was not willing to fly to New York. I then received a telephone call from someone at the American Embassy in London, who also told me that I had to testify and that the U S Government was prepared to have a nurse accompany me to New York.

I then tried to call Mr. MacDonald in New York to tell him once more that I was not willing to travel. I spoke to a man who said he was Mr. MacDonald's assistant and that Mr. MacDonald was in court. When I told this man that I was not willing to travel to New York, he became very rude and told me that if I did not come to New York, the United States Government would have me arrested in England and extradited to the United States and that in the future I would never be allowed into the United States again.

The next day I received a further call from Mr. MacDonald telling me to testify. By that time I was exhausted from the daily pressure and terrified that if I failed to come to the United States, I would be subject to arrest and extradition.

Affidavit of Eva Eileen Brooke.

I finally agreed to fly to New York despite the fact that my doctors had advised me not to travel. I was met in the TWA baggage area by two men who said they were from Mr. MacDonald's office and escorted me to a car which took me directly to the federal courthouse where Mr. MacDonald put me in the witness stand after again interviewing me for a few minutes.

Subsequent to my testimony, I was interviewed by Mr. Leonard's lawyer but did not disclose to him the circumstances under which I had come to the trial.

I have since learned that the threats to have me arrested and extradited were false and that, as a citizen and resident of England, I could not have been compelled against my will to travel to New York to testify against Mr. Leonard.

I have been asked by Mr. Leonard and his lawyers to furnish this affidavit. I do so freely without any threats or inducements.

EVA EILEEN BROOKE
Eva Eileen Brooke

Sworn to before me
this 8th day of March, 1976.

M. J. SCANNALL
NOTARY PUBLIC OF LONDON, ENGLAND
My commision expires with life.

(SEAL)

Affidavit of Eva Eileen Brooke.

GREAT BRITAIN AND NORTHERN IRELAND
LONDON, ENGLAND
EMBASSY OF THE UNITED STATES OF AMERICA } ss.

I, ROBERT E. WATKINS, JR. Vice Consul of the United States of America residing at London, England, duly commissioned and qualified do hereby certify that

MARTIN JOHN SCANNALL

whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof a Notary Public at London, England, duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said

MARTIN JOHN SCANNALL

on the annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this eighth day of March in the year of Our Lord one thousand nine hundred and seventy-six.

ROBERT E. WATKINS, JR.
(SEAL) Robert E. Watkins, Jr.
Vice Consul of the United States of America at London, England.

Service Receipt No. G0962196
Tariff Item No. 48
Fee: $2.50

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